**PUBLIC DOCUMENT**

**BEFORE THE**
**UNITED STATES TRADE REPRESENTATIVE**

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| **IN THE MATTER OF:** | ) | |
| | ) | Investigation No. TA-201-73 |
| **Certain Steel** | ) | |
| | ) | |

# WRITTEN COMMENTS OF EMPRESAS RIGA, S.A. DE C.V. ("Riga") and NIPLES DEL NORTE, S.A. DE C.V. ("NDN") REGARDING CARBON AND ALLOY FLANGES & FITTINGS

## POTENTIAL ACTION UNDER SECTION 312 OF THE NAFTA IMPLEMENTATION ACT AND SECTION 203 OF THE TRADE ACT OF 1974 WITH REGARD TO IMPORTS OF CERTAIN STEEL

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## SUMMARY OF ARGUMENT

- Imports from Mexico must be excluded unless the President reaches an affirmative determination under section 312 of the NAFTA Implementation Act.
  - Section 312 of the NAFTA Implementation Act (19 U.S.C. § 3372) requires the exclusion of imports from Mexico unless the President determines that such imports: 1) account for a substantial share of total imports and 2) contribute importantly to the serious injury found to exist.
    - Imports from a NAFTA country are not considered to account for a substantial share of imports if that country was not a top-five supplier during the most recent three-year period. (19 U.S.C. § 3371(b)(1); *see also* NAFTA Art. 802.2(a))
    - Imports from a NAFTA country are not considered to have contributed importantly to the serious injury if the **growth** rate of the NAFTA country's imports during the period in which an injurious increase in imports occurred is appreciably lower than the growth rate of total imports. (19 U.S.C. § 3371(b)(1); *see also* NAFTA Art. 802.2(b))
  - Section 312 of the NAFTA Implementation Act implements Articles 802.1 and 802.2 of the NAFTA. The U.S. legislation grants the President sole authority to make such determinations. Any finding by the International Trade Commission in this regard is not binding. Thus, it is solely within the power of the President to determine whether imports from Mexico are to be excluded.
- The factual record and the NAFTA Implementation Act standard support a negative determination with respect to imports of Flanges and Fittings from Mexico.
  - The undisputed facts presented by the Mexican Flanges and Fittings Industry establish that imports from Mexico do not "contribute importantly" to any serious injury or threat thereof experienced by U.S. producers.
    - From 1998 to 2000, global imports increased 15.6%, whereas imports from Mexico **decreased** 9.6%. Mexican import share fell almost 10 percentage points, from 23.8% to 13.9%.
    - From 1996 to 2000, global imports increased 30.8%, whereas imports from Mexico increased, but only by 9.6%. Despite a slight increase in the absolute volume of imports from Mexico, Mexican import share fell from 16.5% to 13.9%.
    - From 1998 to 2000, imports from Mexico also declined relative to domestic production and apparent consumption, while imports from other sources increased relative to these two measures. Imports from Mexico **declined** from 13% of domestic production in 1998 to 10% in 2000, and from 8.5% of apparent consumption in 1998 to 5.8% in 2000. In contrast, total imports increased from

55% of domestic production in 1998 to 70% of domestic production in 2000, and from 35.5% of apparent consumption in 1998 to 41.7% in 2000.

- From 1996 to 2000, imports from Mexico increased by only 1.3 percentage points relative to domestic production, but remained stable relative to apparent consumption. In contrast, total imports increased by over 19 percentage points relative to domestic production and by over 6 percentage points relative to apparent consumption.

- Imports from Mexico did not affect the financial performance of the U.S. producers. Imports from Mexico were declining sharply at the same time that U.S. producers experienced a sharp decrease in operating income.

- Competition between imports from Mexico and U.S. products is limited and is not based on price.

- Imports of Flanges and Fittings from Mexico do not threaten to injure the U.S. producers.

  - Mexican producers' capacity utilization increased considerably from 2000 through the first half of 2001.

  - Inventory levels are stable in absolute terms and relative to total shipments.

- Even if the President determines that imports of Flanges and Fittings from Mexico account for a substantial share of total imports and contribute importantly to the serious injury, the President may, nevertheless, impose no remedy or a less restrictive remedy on imports from Mexico.

  - The NAFTA and U.S. law establish unique national interest considerations applicable only to NAFTA countries that require exclusion.

    - Any decision to apply a remedy against Mexico must take into consideration the impact on the United States industries and firms as a result of international obligations regarding compensation. (19 U.S.C. § 2253(a)(2)(F)(iii))

      - Article 802.6 of the NAFTA gives Mexico the right to immediate and unconditional compensation or retaliation.

        - Mexico's right to retaliation is not limited to steel products.

        - Following the action taken on Mexican broom corn brooms, Mexico retaliated on alcohol, notebooks, glass, and wooden office furniture.

      - Any decision to apply a remedy against Mexico must take into account the short-term and long-term economic and social costs of the actions . . . relative to their short-term and long-term economic and social benefits and other considerations relative to the position of the domestic industry in the United States economy. (19 U.S.C. § 2253(a)(2)(E))

- ♦ Any decision to apply a remedy against Mexico must take into account the national interest issues related to NAFTA integration. (19 U.S.C. § 2253(a)(2)(F))
  - o One of the fundamental purposes of the NAFTA is to promote the integration of the U.S. and Mexican markets by reducing tariffs and other restrictions on commerce between the two countries. Any remedy on Mexican steel imports could serve to disrupt further integration.

- Any remedy the President may impose on Mexico must be consistent with the United States' obligations under the NAFTA.

  - Chapter 8 of the NAFTA establishes unique NAFTA limitations on any remedies in any form.

    - ➢ No action of any kind may have the effect of reducing imports below the trend of imports from Mexico over a "recent representative base period." (NAFTA Art. 802.5(b))

    - ➢ Any representative period used for remedy must be based on the most "representative period" for imports from Mexico, not the period applicable to total imports. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))

    - ➢ No action of any kind may have the effect of limiting "reasonable growth" above the trend. (NAFTA Art. 802.5(b))

  - The remedy recommended by the Commission does not comply with U.S. NAFTA obligations, and therefore, cannot be adopted by the President.

  - The NAFTA Implementation Act (19 U.S.C. § 3371 et seq) and Chapter 8 of the NAFTA establish unique NAFTA limitations on quantitative restrictions.

    - ➢ No quantitative restriction may be imposed that does not permit the importation of a quantity or value of the imports equivalent to that imported during the "most recent period that is representative." (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))

    - ➢ No quantitative restriction may be imposed that limits "reasonable growth" above the base period. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))

    - ➢ No quantitative limitation may be based on a period other than the most recent period that is representative – thus, there is no ability to consider other quantities that are "clearly justified" to eliminate the injury. (*Compare* 19 U.S.C. § 3372(d) *with* 19 U.S.C. § 2253(e)(4); *see also* NAFTA Art. 802.5(b))

    - ➢ Any representative period used for remedy must be based on the most "representative period" for imports from Mexico, not the period applicable to total imports. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))

- Differential and preferential treatment is permitted under the WTO.
  - Mexico May Be Excluded or Subject to a Lesser Remedy.
    - Article XXIV of the GATT 1994 provides an exception for free-trade areas.
      - Article XXIV:5 of the GATT 1994 provides in relevant part that "provisions of this Agreement shall not prevent, as between the territories of Members, the formation of . . . a free-trade area . . . ."
      - Article XXIV:8(b) of the GATT 1994 defines a free-trade area as:

        > a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

    - The recent WTO panel decision in *Line Pipe* confirms that a free-trade area participant can be excluded.
      - The panel reasoned that Article XXIV:5 authorizes WTO members to eliminate "'duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) . . . on substantially all trade' between them and their free-trade partners." The panel found that excluding a free-trade participant from a safeguard measure was consistent with the purpose of forming a free-trade area.
      - The panel found that the United States was entitled to rely on Article XXIV regarding the exclusion of Mexico and Canada from the scope of the line pipe remedy.

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# COMMENTS OF THE MEXICAN FLANGES AND FITTINGS INDUSTRY REGARDING APPLICATION OF SECTION 312 OF THE NAFTA IMPLEMENTATION ACT TO IMPORTS FROM MEXICO OF FLANGES AND FITTINGS

## I. INTRODUCTION

White & Case, LLP hereby submits comments on behalf of Niples del Norte, S.A. de C.V., a producer of carbon welded pipe nipples; and Empresas RIGA, S.A., a producer of carbon butt-weld pipe fittings (jointly the "Mexican Producers") regarding application of Section 312 of the North American Free Trade Agreement Implementation Act[1] to imports from Mexico of Flanges, Fittings & Tool Joints (hereinafter "Flanges & Fittings").

The comments submitted here support those set forth by the Mexican Producers throughout the proceedings at the U.S. International Trade Commission. In these comments, we discuss why the President should reach a negative determination under section 312 of the NAFTA Implementation Act with respect to imports from Mexico of Flanges & Fittings. The President, alone, has the authority to exclude imports from Mexico. The International Trade Commission's authority is limited to finding and reporting to the President.

Some of the key undisputed facts that show imports of Flanges and Fittings from Mexico did not "contribute importantly" to the serious injury are: 1) from 1998 to 2000, imports from Mexico **declined** by over 32% while total imports increased by over 15%; 2) from 1998 to 2000, Mexican import share declined by almost 10 percentage points; 3) from 1996 to 2000, imports from Mexico increased slightly, but Mexico's share of total imports declined; 4) from 1996 to 2000 imports from Mexico remained stable relative to apparent consumption and increased only

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[1] Pub. L. No. 103-182, 107 STAT. 2057 (1993), as amended, 19 U.S.C. § 3372 (hereinafter "the NAFTA Implementation Act").

slightly relative to domestic production, in contrast to total imports which increased significantly relative to domestic production and apparent consumption; 5) import volumes from Mexico were declining sharply when the U.S. producers experienced sharp declines in operating income; and 6) imports from Mexico compete in different segments of the market and do not compete on price.

We also discuss why, if the President reaches an affirmative determination under section 312 of the NAFTA Implementation Act, it would be appropriate for the President to exclude imports of Flanges and Fittings from Mexico from any remedy based on the factors the President is directed to consider under section 203 of the Trade Act of 1974.

Then, we discuss the NAFTA provisions and the NAFTA Implementation Act provisions that require a unique and less restrictive remedy on imports from Mexico, should the President decide to impose a remedy.

Finally, we discuss the provisions of the WTO and reference the WTO precedent that allows the United States to take no action against imports from Mexico, or to impose a less restrictive remedy on imports from Mexico than on global imports.

## II. IMPORTS FROM MEXICO MUST BE EXCLUDED UNLESS THE PRESIDENT REACHES AN AFFIRMATIVE DETERMINATION UNDER SECTION 312 OF THE NAFTA IMPLEMENTATION ACT

### A. Section 312 of the NAFTA Implementation Act Requires the Exclusion of Imports from Mexico Unless the President Determines that Such Imports: (1) Account for A Substantial Share of Total Imports and (2) Contribute Importantly to the Serious Injury

Section 312 requires the exclusion of imports from Mexico unless the President determines that:

(1) imports from such country, considered individually, account for a substantial share of total imports; or

(2) imports from a NAFTA country, considered individually, or, in exceptional circumstances imports from NAFTA countries considered collectively, contribute

> importantly to the serious injury, or threat thereof, found by the International Trade Commission.[2]

While the statutory provisions governing the President's determination do not set forth the factors that the President is to consider in making the above determinations, both the NAFTA and section 311 of the NAFTA Implementation Act define them as follows:

> (1) Substantial Import Share
>
> In determining whether imports from a NAFTA country, considered individually, account for a substantial share of total imports, such imports normally shall not be considered to account for a substantial share of total imports if that country is not among the top 5 suppliers of the article subject to the investigation, measured in terms of import share during the most recent 3-year period;
>
> (2) Application of "contribute importantly" standard
>
> In determining whether imports from a NAFTA country or countries contribute importantly to the serious injury, or threat thereof, the International Trade Commission shall consider such factors as the change in the import share of the NAFTA country or countries, and the level and changes in the level of imports of such country or countries. In applying the preceding sentence, imports from a NAFTA country shall not be considered to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from such country or countries during the period in which an injurious increase occurred is appreciably lower than the growth rate of total imports from all sources over the same period.[3]

In considering whether imports from the NAFTA countries "contribute importantly" to serious injury or threat thereof for purposes of applying the NAFTA exclusion, the President may consider imports from these countries collectively only in "exceptional circumstances."[4] While the statute does not define "exceptional circumstances," the Statement of Administrative Action to NAFTA states that "the ITC is likely to consider imports from NAFTA countries

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[2] 19 U.S.C. § 3372(a)

[3] 19 U.S.C. § 3371(b); *see also* NAFTA Art. 802.2.

[4] 19 U.S.C. § 3371(a)(2); 19 U.S.C. § 3372(a)(2).

collectively when imports from individual NAFTA countries are each small in terms of import penetration, but collectively are found to "contribute importantly" to serious injury or a threat of serious injury."[5] The Commission did not find in its recommendations, nor did any party argue that "exceptional circumstances" existed. Thus, the President should evaluate the effects of imports from Mexico individually.

### B. Section 312 of the NAFTA Implementation Act Implements U.S. Obligations under the NAFTA, and Grants the President *De Novo* Authority to Determine Whether Imports from a NAFTA Country Account for A Substantial Share and Contribute Importantly to the Serious Injury

In contrast to the International Trade Commission's role under the NAFTA Implementation Act, which is to find and report to the President,[6] the President's action is determinative. Under the NAFTA Implementation Act, the President must engage in a *de novo* review of the facts to determine whether imports from Mexico account for a substantial share of total imports and contribute importantly to the serious injury. This authority differs from the President's authority under section 203 of the Trade Act of 1974.

Under section 203 of the Trade Act of 1974, the President takes the Commission's injury findings as a given, but retains the authority to withhold relief on imports. Under the NAFTA Implementation Act, however, the President does not take the Commission's NAFTA findings with respect to imports from Mexico and Canada as a given, but rather, the President must make his own NAFTA determination. The President also has the authority under section 203 of the

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[5] *Wheat Gluten* at I-19, *citing* Statement of Administrative Action Accompanying the North American Free Trade Agreement, as published in H.Doc. 103-159, 103d Cong., 1st Sess. (1993), at 565; *see also Circular Welded Carbon Quality Line Pipe* at I-34 (finding that "exceptional circumstances" do not exist to warrant a combination of imports from Canada and Mexico).

[6] *See* 19 U.S.C. § 3371(a).

Trade Act of 1974 to withhold relief on imports from those countries. As discussed below, the facts warrant the President finding that imports of Flanges & Fittings from Mexico do not contribute importantly to the serious injury, and even if the President finds that they do, consideration of the factors under section 203 of the Trade Act of 1974 warrants withholding relief.

## III. THE FACTUAL RECORD AND THE NAFTA IMPLEMENTATION ACT STANDARD SUPPORT A NEGATIVE DETERMINATION WITH RESPECT TO IMPORTS OF FLANGES AND FITTINGS FROM MEXICO

### A. The Undisputed Facts Presented by the Mexican Flanges and Fittings Industry Establish that Imports from Mexico Do Not "Contribute Importantly" to the Serious Injury

#### 1. Mexico's import trends vary significantly from total import and non-NAFTA imports trends

The following chart provides information regarding trends in global imports and imports from Mexico of Flanges and Fittings:

| Concept | 1996 | 1997 | 1998 | 1999 | 2000 | YTD 2000 | YTD 2001 |
|---|---|---|---|---|---|---|---|
| Global Imports | 103,507 | 105,313 | 117,093 | 117,461 | 135,399 | 61,588 | 81,380 |
| Imports from Mexico | 17,114 | 19,090 | 27,868 | 18,268 | 18,761 | 8,610 | 9,976 |
| Absolute Change in Global Imports | N/A | 1,806 | 11,780 | 368 | 17,938 | N/A | 19,792 |
| Absolute Change in Imports from Mexico | N/A | 1,976 | 8,778 | -9,600 | 493 | N/A | 1,366 |
| Mexican Share of Total Imports | 16.53% | 18.13% | 23.80% | 15.55% | 13.86% | 13.98% | 12.26% |

Source: PR at Table TUBULAR-8.[7]

As demonstrated above, during the period 1998-2000 imports of Flanges & Fittings from Mexico **decreased** 32.68% or by 9,107 short tons, whereas global imports **increased** 15.63% or by 31,892 short tons. Mexican import share **fell** 9.94 percentage points, from 23.80% to 13.86%.

During the period 1996-2000, imports from Mexico of Flanges & Fittings increased slightly by 1,647 short tons, whereas global imports increased by 31,892 short tons. Thus, imports from Mexico accounted for only 5% of the global increase. Despite the small increase in imports from Mexico in absolute terms, Mexican import share **fell** by 2.67 percentage points during the period from 16.53% to 13.86%.

Imports from Mexico of Flanges & Fittings have fluctuated from one year to the next. In contrast, global imports consistently grew each year of the period of investigation. Furthermore, from 1999 to 2000, when global imports showed their largest year-to-year gain of 19,938 short tons, imports from Mexico increased by only 493 tons.[8] The increase in imports from Mexico

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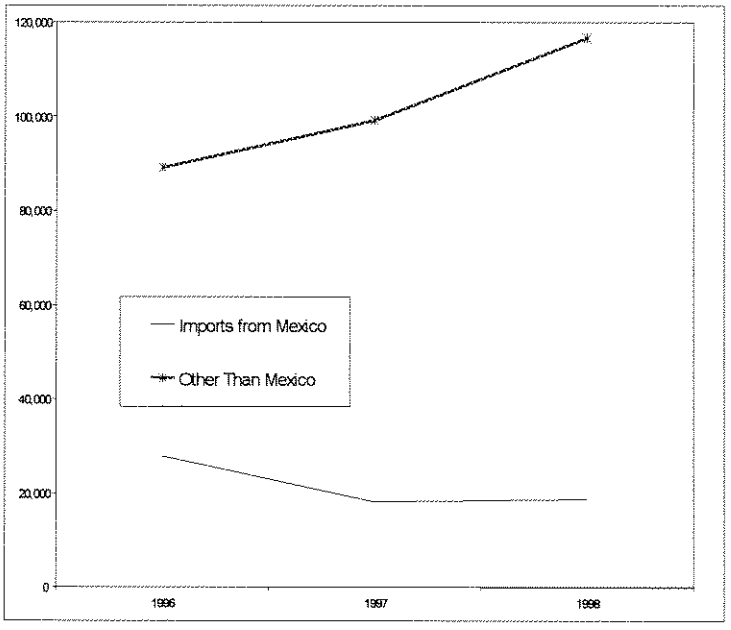
[7] We have referred to the public versions of the Commission's Staff Report in Investigation No. TA-201-73 throughout these comments as "PR." We have referred to the Commission's report to the President as the "Commission Report."

[8] The Commission cited this "increase" in support of its recommendation that imports from Mexico be included. Nevertheless, the Commission also acknowledged that total imports

(continued...)

represented only 2.7% of the increase in global imports. Such increase cannot reasonably be viewed as an "important cause" of any injury experienced by the US industry.

These points are made clear in the following graph comparing imports of Flanges & Fittings from Mexico to imports from other sources:




Source: PR at Table TUBULAR-8.

Finally, during the interim period imports of Flanges & Fittings on an annualized basis were 29.46% below 1998 levels, although they increased slightly in comparison to the same period in 2000.

### 2. Mexico's share of total imports has declined throughout the POI

Imports of Flanges & Fittings from Mexico have also declined as a share of total imports during the POI, further demonstrating the lower rate of "growth" of imports from Mexico relative to total imports. In 1996, Mexico's share of total imports was 17%. In 2000, Mexico's

(...continued)

had increased more dramatically than imports from Mexico during the period 1998-2000. *See* Commission Report at 179-180.

share declined to 14%. In interim 2001, Mexico's share of total imports declined to 12%, its lowest level during the POI.

### 3. Imports from Mexico have fallen in relation domestic production and apparent consumption as well

As demonstrated by the following chart, Mexican imports also fell relative to domestic production and apparent domestic consumption ("AC").

| Concept | 1996 | 1997 | 1998 | 1999 | 2000 | YTD 2000 | YTD 2001 |
|---|---|---|---|---|---|---|---|
| Imports from Mexico | 17,114 | 19,090 | 27,868 | 18,268 | 18,761 | 8,610 | 9,976 |
| Global Imports | 103,507 | 105,313 | 117,093 | 117,461 | 135,399 | 61,588 | 81,380 |
| Domestic Production | 204,972 | 220,881 | 211,648 | 186,940 | 194,175 | 103,707 | 91,669 |
| AC | 295,929 | 319,785 | 329,472 | 311,352 | 324,712 | 157,872 | 174,334 |
| Total Imports / Domestic Production | 50.5% | 47.7% | 55.3% | 62.8% | 69.7% | 59.4% | 88.8% |
| Imports from Mexico / Domestic Production | 8.3% | 8.6% | 13.2% | 9.8% | 9.66% | 8.30% | 10.88% |
| Total Imports / AC | 35.0% | 32.9% | 35.5% | 37.7% | 41.7% | 39.0% | 46.6% |
| Imports from Mexico / AC | 5.8% | 6.0% | 8.5% | 5.9% | 5.8% | 5.5% | 5.7% |

Source: Import volumes were obtained from the PR at Table TUBULAR-8. Domestic production was obtained from the PR at Table TUBULAR-14. Apparent consumption was obtained from the PR at Table TUBULAR-45.

During the period 1998-2000, imports from Mexico **fell 23%**, from 13% to 10% of domestic production. At the same time, imports from other sources **increased 27%**, from 55% to 70% of domestic production. During the period 1996-2000, imports from Mexico increased slightly from 8.3% to 9.7% of domestic production, whereas imports from other sources increased from 50.5% to 69.7% of domestic production.

During the period 1998-2000, imports from Mexico of Flanges & Fittings **fell** by 31.8% from 8.5% to 5.8% of apparent consumption. At the same time, imports from other sources **increased** 17.5%, from 35.5% to 41.7% of apparent consumption. During the period 1996-2000,

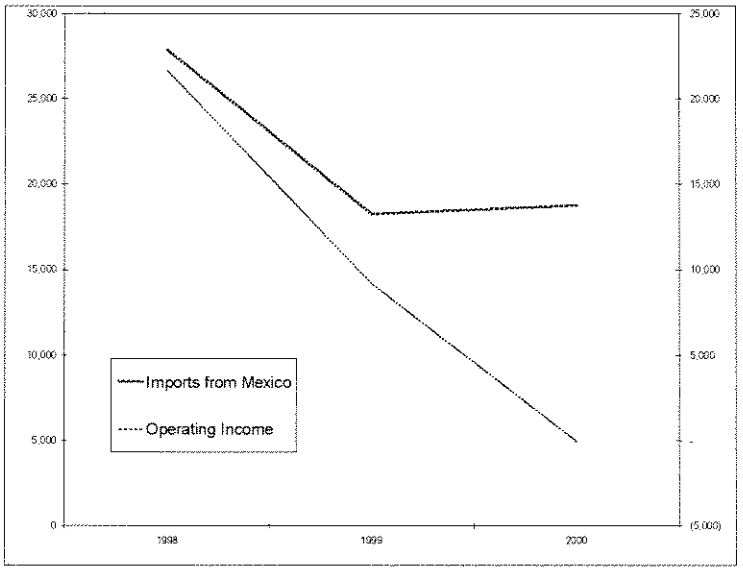
Mexico's share of apparent consumption remained the same, whereas imports from other sources increased 19.1%, from 35.0% to 41.7% of apparent consumption.

Finally, from 1999 to 2000 when global imports of Flanges & Fittings had their largest single-year increase in volume going from 62.8% to 69.7% of domestic production and from 37.7% to 41.7% of apparent consumption, imports from Mexico fell from 9.8% to 9.7% of domestic production and from 5.9% to 5.8% of apparent consumption.

### 4. Imports from Mexico do not affect the financial performance of U.S. producers

As discussed above, the trends in imports of Flanges & Fittings from Mexico are quite distinct from those of global imports. Because of the downward trend in Mexican import volumes, and in the percentage of domestic production and apparent consumption accounted for by imports from Mexico, such imports do not "contribute importantly" to the performance of U.S. producers.

In the following graph, we have plotted imports from Mexico against absolute levels of operating income experienced by U.S. producers of Flanges & Fittings during the period 1996-2000.




Source: Mexican import volumes based on the PR at Table TUBULAR-8. Operating income of domestic producers obtained from PR at Table TUBULAR-20.

As is readily apparent from this chart, the sharp decrease in operating income of US Flanges & Fittings producers from 1998 to 1999 was accompanied by a **significant fall** in imports from Mexico. Furthermore, as operating income continued to fall from 1999 to 2000, imports from Mexico remained flat. Therefore, imports from Mexico cannot be an "important cause" of the U.S. producers' performance.

### 5. Competition between Flanges & Fittings imported from Mexico and those from the United States and other import sources is limited and is not based on price

The Commission has grouped together in the Flanges & Fittings product category many distinct products that do not compete in the market because they are not interchangeable. Any analysis of the conditions of competition at the Flanges & Fittings level, thus, yields meaningless results. It therefore is necessary to examine the conditions of competition at a level where the products are interchangeable and potentially compete. Such an analysis establishes that there is limited competition between products imported from Mexico and products from the United

States and imported from other sources, and that imported products from Mexico do not compete based on price.

### a. Mexico's participation in the welded pipe nipple market is based on superior service, not low prices

In 1994, the domestic industry producing carbon welded and seamless pipe nipples filed an antidumping duty petition against imports of carbon welded pipe nipples from Mexico.[9] In a 5-1 negative preliminary vote, the Commission found that there was no reasonable indication that Mexican imports caused or threatened to cause material injury to the domestic industry.[10] Regarding welded pipe nipples, **the Commission found that the domestic industry's claim that Niples del Norte had taken away major home-center clients (i.e., Home Depot) through underselling was incorrect. The Commission determined that the domestic industry lost such sales because it could not meet customer service requirements.**[11]

The same situation exists today. As Mr. Russildi testified:

> The nature of Mexico's participation in the U.S. market has not changed. We win and keep U.S. business, because we are willing to provide services that others cannot or will not. We sell to large home centers, like Home Depot and those companies, because home centers sell to the public and they have different needs than distributors selling to the plumbing trade.
>
> Home centers need small quantities of a variety products, like pipe nipples and pipe, shipped directly to retail locations. They demand that we label and package products based on their standards. This enables home centers to avoid large centralized inventories and to shift to us the expense of packing and consolidating products. Finally, home centers demand that we deliver merchandise as promised, when promised. . . . So, what we

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[9] *See Carbon Steel Pipe Nipples from Mexico*, USITC Pub. 2819 at I-5.

[10] *See id.*

[11] *Id.* at I-15 n.82.

> sell are not just pipe nipples. We sell pipe nipples combined with services.[12]

Niples del Norte, sells primarily to home centers, through an importer and distributor. Home-center clients purchase from Niples del Norte because, as Mr. Russildi noted, it provides services that U.S. producers continue to be unwilling or unable to provide. Most importantly, Niples Del Norte has established successful relationships with clients because of its superior fill rate performance. Fill rate performance measures the degree to which Niples Del Norte is able to deliver complete orders within the period of time specified by the client. Niples del Norte's performance to home centers has been consistent and superior from month-to-month and year-to-date. It is this level of performance and reliability that has enabled Niples del Norte to attract and retain major home-center clients.

In addition, Niples del Norte has made substantial investments in equipment that expedites clients' orders through customized software programs. Niples del Norte also provides "Less-Than-Truckload-Delivery" ("LTL"), by which small orders of multiple products are delivered in direct shipments to specific stores.

Niples del Norte also sells to distributors that service the plumbing industry. However, Niples del Norte's sales in this market segment declined, because of low prices being offered by other suppliers. As Mr. Russildi testified:

> Because of price pressure in this segment of the market, we have reduced our sales. You can see in the statistics, the imports of pipe nipples from Mexico fell 11 percent in 2000, compared with 1998, where the level of imports increased eight percent. This year, our imports are lead by another 35 percent.[13]

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[12] Commission Injury Hearing Transcript ("Tr.") at 2694-95 (Mr. Russildi).

[13] Tr. at 2695 (Mr. Russildi).

Rather than accept such low prices, Niples del Norte has made the strategic decision to forego sales rather than accept low prices. Because U.S. suppliers are not willing to provide the services demanded by these customers, Niples del Norte does not compete with them.

### b. Butt-weld pipe fittings from Mexico participate in a limited segment of the market

Imports from Mexico of butt-weld pipe fittings do not compete in a large part of the U.S. market. The butt-weld pipe fitting market is divided almost evenly between oil country goods and other applications (construction, boilers, heaters, air conditioning, etc.). Butt-weld pipe fittings for oil country goods are manufactured to the standards of the American Petroleum Institute ("API"), while those for other applications are manufactured to lower American Society for Testing and Materials ("ASTM") standards. Butt-weld pipe fittings manufactured to meet API standards must be approved by the end-user and **cannot** be interchanged with products produced for other applications. Further, producing butt-weld pipe fittings that meet API standards requires heat treatment, and different raw material inputs. In contrast, butt-weld pipe fittings for other applications do not need to be approved, do not undergo heat treatment, and are produced from different raw materials. Because of the differences in these standards, the two market segments are distinct.

Mexican products are not typically sold in the oil country segments of the market. In 1999, demand in the oil country segments of the market declined significantly. As a result, U.S. producers that historically served the oil country market shifted production to products meeting only ASTM standards. This caused an oversupply in this segment of the market and a price decrease, which had nothing to do with imports from Mexico.

### B. Imports from Do Not Threaten to Injure the U.S. Producers

An analysis of the traditional threat factors establishes that imports of Flanges & Fittings from Mexico do not threaten to injure the U.S. producers.

#### 1. Mexican producers have little unused capacity

Mexican Producers' capacity utilization has increased considerably from 2000 through the first half of 2001. Finally, as discussed above, Mexican Producers are not selling in the US market at low prices to fill capacity. Rather than accept low prices, Mexican Producers have reduced sales to the US market.

#### 2. Inventory levels are stable

As shown in the Commission's Staff Report, inventory levels of Flanges & Fittings from Mexico are stable both in absolute terms and relative to total shipments.[14]

Based on the facts discussed above, the President should reach a negative determination under section 312 of the NAFTA Implementation Act with respect to imports of Flanges & Fittings from Mexico and take no action against such imports.

## IV. EVEN IF THE PRESIDENT DETERMINES THAT IMPORTS FROM MEXICO ACCOUNT FOR A SUBSTANTIAL SHARE OF TOTAL IMPORTS AND CONTRIBUTE IMPORTANTLY TO THE SERIOUS INJURY, THE PRESIDENT MAY, NEVERTHELESS, IMPOSE NO REMEDY OR A LESS RESTRICTIVE REMEDY ON IMPORTS FROM MEXICO

If the President reaches an affirmative determination under section 312 of the NAFTA Implementation Act, he still must determine whether the factors he must consider under section 203 of the Trade Act of 1974 warrant the exclusion of imports from Mexico from any remedy. As discussed below, a consideration of Mexico's right to immediate compensation or retaliation, the short and long-term economic and social benefits of taking an action and the national interest

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[14] *See* CR at Table TUBULAR-38.

issues related to NAFTA integration all support excluding imports of Flanges & Fittings from Mexico from any remedy on global imports.

### A. The NAFTA and U.S. Law Establish Unique National Interest Considerations Applicable Only to NAFTA Countries that Require Exclusion

#### 1. Any decision to apply a remedy against Mexico must take into consideration the impact on the United States industries and firms as a result of international obligations regarding compensation. (19 U.S.C. § 2253(a)(2)(F)(iii))

##### a. Article 802.6 of the NAFTA gives Mexico the right to immediate and unconditional compensation or retaliation.

Section 203 of the Trade Act of 1974 requires the President to consider, among other factors, the impact on United States industries and firms as a result of international obligations regarding compensation.[15] Article 802.1 states that each NAFTA Party retains its general rights and obligations under Article XIX of the General Agreement on Tariffs and Trade 1994 and the WTO Agreement on Safeguards, "**except those regarding compensation or retaliation and exclusion from an action** to the extent that such rights and obligations are inconsistent with ... Article [802 of the NAFTA]."[16] Article 802.6 of the NAFTA states:

> The Party taking an action ... shall provide to the Party or Parties against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the Parties concerned are unable to agree on compensation, the Party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken ....

Thus, any action taken with respect to imports from Mexico will require that the United States **immediately** compensate Mexico for such action or face retaliation.

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[15] 19 U.S.C. § 2253(a)(2)(F)(iii).

[16] Emphasis added.

In contrast, under Article 8.1 of the WTO Agreement on Safeguards the United States is encouraged to "endeavor to maintain a substantially equivalent level of concessions and other obligations with respect to countries affected by any remedial action taken." However, if the United States fails to do so, a country is **not** entitled to take retaliatory action for the first three years that the remedial action is in effect (as long as there was an absolute increase in imports).[17] Thus, while the President does not have to consider the impact of compensation or retaliation on U.S. industries and firms a result of taking action on non-NAFTA imports, he must do so with respect to imports from Mexico. As discussed below, the impact of taking such an action against imports of Flanges & Fittings from Mexico warrants excluding Mexico.

**i. Mexico's right to retaliation is not limited to steel products.**

Mexico's right to retaliation is not limited to steel products, and thus, any retaliatory measure could impact a wide range of different industries. The fundamental difference in the United States' obligations with respect to imports from Mexico versus global imports suggests that the President should define any action against imports from Mexico narrowly in order to reduce the resulting compensation/retaliation.

**ii. Following the action taken on Mexican broom corn brooms, Mexico retaliated on alcohol, notebooks, glass, and wooden office furniture.**

In the *Broom Corn Broom Case*, the only instance when the United States took a safeguard action against imports from Mexico after the NAFTA entered into force, the United States and Mexico could not agree on appropriate compensation for the trade lost. Mexico

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[17] *See* WTO Agreement on Safeguards, Article 8.3.

retaliated as permitted under Article 802.6 of the NAFTA by imposing additional duties on a wide array of products, as demonstrated by the following chart.[18]

| Tariff Classification | Product | Duty Rate (%) |
|---|---|---|
| 1702.40.01 | Glucose | 12.5 |
| 1702.40.99 | Other glucose products | 12.5 |
| 1702.50.01 | Chemically pure fructose | 12.5 |
| 1702.60.01 | Other fructose and fructose syrups | 12.5 |
| 2204.10.01 | Sparkling wine | 20.0 |
| 2204.21.01 | Fortified wine | 20.0 |
| 2204.21.02 | Red, rosé, and white wine | 20.0 |
| 2204.21.03 | Fine grape wines | 20.0 |
| 2204.21.04 | Champagne | 20.0 |
| 2204.29.99 | Other wines | 20.0 |
| 2206.00.01 | Refreshing beverages based on a mix of lemonade and beer or wine (wine coolers) | 20.0 |
| 2208.30.04 | "Tennessee" Whiskey or Bourbon Whiskey | 20.0 |
| 4820.20.01 | Notebooks | 10.0 |
| 7005.29.02 | Clear floated glass with a thickness below 6 mm. | 20.0 |
| 7005.29.03 | Clear floated glass with a thickness above 6 mm. | 20.0 |
| 7005.29.99 | Other glass | 20.0 |
| 9403.30.01 | Wooden office furniture | 12.0 |
| 9403.50.01 | Wooden bedroom furniture | 14.0 |

To ensure that U.S. industries are not prejudiced by similar compensatory/retaliatory action in this case, it would be appropriate for the President not to impose a remedy on imports from Mexico.

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[18] *See Decreto por el que se aumenta la tasa aplicable a la importación de mercancías originarias de los Estados Unidos de América, Diario Oficial de la Federación,* Vol. DXIX, No. 9, Section I, page 15 (Dec. 12, 1996).

**2. Any decision to apply a remedy against Mexico must take into account the short- and long-term economic and social costs of the actions . . . relative to their short- and long-term economic and social benefits and other considerations relative to the position of the domestic industry in the United States economy (19 U.S.C. § 2253(a)(2)(E)**

Section 203 of the Trade Act of 1974 also requires the President to consider the short and long-term economic and social costs involved in taking an action relative to the short and long-term economic and social benefits, and relative to the position of the domestic industry in the United States economy.[19] As Mr. Javier Mancera from the Embassy of Mexico stated at the Commission's November 6, 2001 remedy hearing: "Any benefit that the U.S. producers might receive through an import restriction may be offset by equivalent restrictions on U.S. exports to Mexico. This would not be in **either** country's interest."[20] Thus, the President must consider the costs of taking the action (i.e., the fact that Mexico will retaliate if adequate compensation is not provided) relative to the benefit the U.S. Flanges & Fittings producers will receive if imports from Mexico are subject to the remedy. Based on the discussion above, particularly that concerning the lack of nexus between imports from Mexico and the U.S. producers' financial performance, the costs would outweigh the benefits, and thus, imports from Mexico should be excluded from the remedy.

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[19] *See* 19 U.S.C. § 2253(a)(2)(E).

[20] *See* November 6, 2001 International Trade Commission Remedy Hearing Transcript at 76 (Mr. Mancera) (emphasis added).

### 3. Any decision to apply a remedy against Mexico must take into account the national interest issues related to NAFTA integration (19 U.S.C. § 2253(a)(2)(F))

Section 203 of the Trade Act of 1974 also requires the President to consider the national economic interests in fashioning a remedy.[21] One of the fundamental purposes of the NAFTA is to promote the integration of the U.S. and Mexican markets by reducing tariffs and other restrictions on commerce between the two countries. Any remedy on Mexican steel imports will disrupt both markets because of the integration that has already occurred, and could serve to disrupt further integration.

In deciding whether to impose a remedy on imports from Mexico, the President must consider the United States' bilateral obligations under NAFTA and the overriding purpose of NAFTA – to promote free trade among the partners. The NAFTA has successfully promoted increased integration between the Mexican and U.S. steel industries.

[21] *See* 19 U.S.C. § 2253(a)(2)(F).

### 4. The Commission's report fails to address any of the factors the President must consider under section 203 of the Trade Act of 1974

No Commissioner addressed any of the section 203 factors that the President must consider in arriving at a remedy with respect to Mexico. The Commission failed to do this despite significant briefing of the issue. By not conducting such an analysis, the Commission's remedy recommendation with respect to flanges and fittings from Mexico cannot be implemented without additional specific findings by the President with respect to each of the criteria. Based upon the considerations noted above, no remedy regarding flanges and fittings is appropriate.[22]

## V. ANY REMEDY THE PRESIDENT MAY IMPOSE ON MEXICO MUST BE CONSISTENT WITH THE UNITED STATES' OBLIGATIONS UNDER THE NAFTA

The Mexican Flanges & Fittings Industry believes that the facts warrant a negative determination under section 312 of the NAFTA Implementation Act, or the exclusion of imports of Flanges & Fittings from Mexico based on the factors in section 203 of the Trade Act of 1974. Nevertheless, if the President decides to take an action against imports of Flanges & Fittings

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[22] On a number of occasions, the President has not imposed general safeguard relief because doing so would not be in the national economic interest. For example, in the 1984 safeguard investigation of copper, the Commission reached an affirmative determination as to injury and recommended the imposition of a 5 cent per pound duty on imports of copper. *See Unwrought Copper*, Inv. No. TA-201-52. The President, however, decided that imports relief would not be in the national economic interest of the country. *See Copper Import Relief Determination*, 49 Fed. Reg. 35609 (Sept. 6, 1984). In the 1985 safeguard investigation of non-rubber footwear, the President again decided that imposing import relief was not in the country's economic interest. Among other factors, the President cited the need for the United States to provide **compensatory tariff reductions** or face retaliatory actions by other foreign suppliers. *See Nonrubber Footwear Import Relief Determination*, 50 Fed. Reg. 35205 (Aug. 30, 1985). Even if the President were inclined to adopt the Commission's recommendation with respect to the NAFTA issues, the Commission's report could not be adopted because it fails to address any of the issues that the President must consider under section 203 of the Trade Act of 1974.

from Mexico, the remedy must comply with U.S. obligations under the NAFTA. This may result in a different and less restrictive remedy being imposed on imports from Mexico than on global imports.

### A. Chapter 8 of the NAFTA Establishes Unique NAFTA Limitations On Any Remedies In Any Form

The general standard applicable to global import remedies cannot be applied to imports from Mexico. Rather, the remedy standard set forth in Article 802.5 of the NAFTA must be met. That article states:

> No Party may impose restrictions on a good in ... [a safeguard] action ... :
>
> > (b) that would have the effect of reducing imports of such good from a Party below the trend of imports for the good from that Party over a recent representative base period with allowance for reasonable growth.

Article 802.5(b), thus, imposes the following unique NAFTA limitations on remedies:

- No action of any kind may have the effect of reducing imports below the trend of imports from Mexico over a "recent representative base period." (NAFTA Art. 802.5(b))
- Any representative period used for remedy must be based on the most "representative period" for imports from Mexico, not the period applicable to total imports. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))
- No action of any kind may have the effect of limiting "reasonable growth" above the trend. (NAFTA Art. 802.5(b))

These limitations differ from those applicable to global imports in several important ways:

First, the types of restrictions covered by the NAFTA limitations and the global limitations are different. Article 802.5(b) applies to **all** "restrictions on a good" imported from Mexico, regardless of whether the restriction is in the form of a quota, a duty, or a tariff-rate quota. In contrast, a similar type of limitation set forth in Section 203(e)(4) of the Act with respect to global imports applies only to quantitative restrictions.[23]

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[23] 19 U.S.C. § 2253(e)(4).

Second, the NAFTA standard creates a condition related to the "trend of imports in the representative period." No such "trends" standard exists under the global standard. Under Article 802.5(b) of the NAFTA, the President may not impose a restriction that would cause imports to fall below the "**trend** of imports for the good" during the base period. In contrast, under Section 203(e)(4) of the Act, the President need not consider the trend during the representative period.[24] Also, the NAFTA "representative period" relates to what is representative of imports from Mexico, which may be different than that which is representative for non-NAFTA countries.

Third, under Article 802.5(b), the President's remedy must allow for "reasonable **growth**" in imports from Mexico above the recent trends, regardless of the period for which action is taken.

Thus, the standard applicable to imports from Mexico is more liberal and less discretionary than that applicable to global imports.

For example, with regard to the imposition of a tariff, the only limitation on the President's authority under U.S. law is that he may not increase the tariff more than 50% percent *ad valorem* above the existing rate.[25] Under the NAFTA, the President does not have the discretion to impose a tariff on imports from Mexico that would reduce imports below the trend of imports from Mexico over a recent representative base period, nor can the President impose a tariff that does not allow for reasonable growth.

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[24] *Id.* § 2253(e)(4).

[25] *See id.* § 2253(e)(3).

### B. The Recommended Increased Tariff Rates Do Not Comply with U.S. NAFTA Obligations and, Therefore, Cannot Be Adopted By the President

#### 1. The tariffs recommended would reduce imports from Mexico below the trend of imports from Mexico over a recent representative base period, are not based on a representative period of imports from Mexico and would limit reasonable growth above the trend

As discussed above, the NAFTA contains unique limitations on the relief that may be imposed on a NAFTA partner. The 13% *ad valorem* tariff recommended by the Commission violates each of the NAFTA limitations, as does the 30% *ad valorem* tariff recommended by Commissioner Bragg.[2627]

Either the 13% or 30% tariff increase would lead to a reduction in the volume of imports from Mexico below recent representative levels. An economic study published by the Trade Partnership Worldwide has estimated that a 20.7% tariff increase would lead to a 35.9% reduction in the volume of imports and that a 9.2% tariff increase would lead to an 18.5% reduction in the volume of imports.[28] Such a decline violates the NAFTA requirement that no remedy result in a decline in import volume below the most recent representative levels.

In addition, the Commission's proposed tariff increase violates the NAFTA obligation that any remedy imposed on a NAFTA partner allow for reasonable growth above the volume found in the most recent representative period. The Commission's proposed tariff would be

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[26] Commissioners Hillman and Devaney reached negative determinations with respect to imports of carbon and alloy fittings and flanges from Mexico.

[27] Another factor that prohibits the President from adopting the Commission's remedy recommendation, as noted above, is that the Commission's remedy recommendation does not discuss any of the factors the President is required to consider under section 203 of the Trade Act of 1974.

[28] Available at http://www.citac-trade.org. The Commission's models that show the effects of various remedies has not yet been released to the parties.

reduced by 3 percentage points annually (Commissioner Bragg recommended a 2 percentage point reduction). Neither of the Commission's recommended annual reduction proposals comport with the U.S. NAFTA obligations because neither provides an allowance for imports from Mexico to grow at reasonable levels that are above the volumes in the most recent representative period.

### C. The NAFTA Implementation Act (19 U.S.C. § 3371 et seq) and Chapter 8 of the NAFTA Establish Unique NAFTA Limitations On Quantitative Restrictions

In addition to the unique limitations imposed by Article 802.5 of the NAFTA on any remedy in any form, the U.S. implementing legislation and the NAFTA also establish unique limitations on the kind of quantitative restrictions that may be imposed on a NAFTA partner:

- No quantitative restriction may be imposed that does not permit the importation of a quantity or value of imports during the "most recent period that is representative." (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))
- No quantitative restriction may be imposed that limits "reasonable growth" above the base period. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))
- No quantitative limitation may be based on a period other than the most recent period that is representative – thus, there is no ability to consider other periods reflecting lower quantities that are "clearly justified" to eliminate the injury. (*Compare* 19 U.S.C. § 3372(d)) *with* 19 U.S.C. § 2253(e)(4); *see also* NAFTA Art. 802.5(b))
- Any representative period used for remedy must be based on the most "representative period" for imports from Mexico, not the period applicable to total imports. (19 U.S.C. § 3372(d); NAFTA Art. 802.5(b))

First, the base period under the NAFTA standard is different than that under the global standard. Under Article 802.5(b), the Party imposing a remedy must consider as a base period "a recent representative period." Under Section 203(e)(4) of the Act, however, the President normally must consider as the base period for global imports "the most recent 3 years that are

representative of imports."[29] Thus, under NAFTA, there is no requirement that the relief be based on a three year period.[30] Also, the NAFTA "representative period" relates to what is representative of imports from Mexico, which may be different than that which is representative for non-NAFTA countries.

Next, the U.S. implementing legislation requires that any quantitative restriction recommended for imports from Mexico allow for "reasonable growth."[31] There is no such provision with respect to a quantitative restriction recommended for non-NAFTA imports.[32]

Finally, there is no provision in the U.S. implementing legislation for the selection of a quantity or value below those in the recent representative period. In contrast, for non-NAFTA imports, the President may impose a quantitative restriction that results in a quantity or value that is lower than recent representative periods if it is "clearly justified."[33]

Based upon these considerations, the President may exclude Mexico even if he finds that imports from Mexico account for a substantial share of total imports and that imports from Mexico contribute importantly to the serious injury found to exist.

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[29] *Id.* § 2253(e)(4)

[30] However, the President should recognize that Mexico retains its status as a most-favored nation. As such, any remedy that the President may impose on imports from Mexico must be at least as favorable as the remedy applied to other MFN countries. Thus, if the application of a NAFTA provision results in a less-favorable remedy than that which Mexico would receive as an MFN, the MFN remedy should be applied.

[31] *See* 19 U.S.C. § 3372(d).

[32] *See* 19 U.S.C. § 2253(e)(4).

[33] *See* 19 U.S.C. § 2253(e)(4).

## VI. DIFFERENTIAL AND PREFERENTIAL TREATMENT IS PERMITTED UNDER THE WTO

### A. Mexico May Be Excluded or Subject to a Lesser Remedy

#### 1. Article XXIV of the GATT 1994 provides an exception for free-trade areas

Article XXIV:5 provides in relevant part that "the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of . . . a free-trade area . . . ."

Article XXIV:8(b) defines a free-trade area as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Thus, where Members agree to participate in a free-trade area, Members must also agree to eliminate "duties and other restrictive regulations of commerce." As a WTO panel recently found, this provision allows Members to exclude a participant in a free-trade area from a safeguard measure taken against non-participants because it is part of substantially eliminating "duties and other restrictive regulations of commerce."

#### 2. The recent WTO panel decision in *Line Pipe* confirms that a free-trade area participant can be excluded

In the recent WTO challenge Korea brought against the United States' imposition of safeguard measures on line pipe, the WTO panel found that the United States has the right to exclude NAFTA countries from a measure.[34] The panel found that the United States was entitled to rely on Article XXIV as a defense to Korea's claims under Articles I, XIII and XIX of GATT 1994 and Article 2.2 of the Agreement on Safeguards.[35] The panel reasoned that Article XXIV:5

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[34] *See United States – Definitive Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Panel, WT/DS202/R ¶ 7.146 (Oct. 29, 2001)

[35] *See id.*

authorizes WTO members to eliminate "'duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) . . . on substantially all trade' between them and their free-trade partners."[36] The United States had imposed a tariff quota, which the panel determined constituted a "duty or other restrictive regulation of commerce" within the meaning of Article XXIV:5. The panel found that excluding a free-trade participant from a safeguard measure was consistent with the purpose of forming a free-trade area. Finally, the panel found that the United States was entitled to rely on Article XXIV regarding the exclusion of Mexico and Canada from the scope of the line pipe remedy. Thus, a decision to exclude imports of Flanges & Fittings from Mexico would be consistent with U.S. WTO obligations.

## VII. CONCLUSION

For the reasons discussed above, the President should reach a negative determination under section 312 of the NAFTA Implementation Act concerning imports from Mexico of Flanges & Fittings. The President should accordingly exclude imports from Mexico of Flanges & Fittings from the remedy imposed on imports from other countries. Even if the President makes an affirmative finding under section 312 of the NAFTA Implementation Act, the factors to be considered under section 203 of the Trade Act of 1974 warrant excluding imports of Flanges & Fittings from Mexico. Excluding imports of Flanges & Fittings from Mexico would be consistent with U.S. WTO obligations, and would ensure that the fundamental integration that has occurred, which has significantly benefited U.S. producers, is not disrupted.

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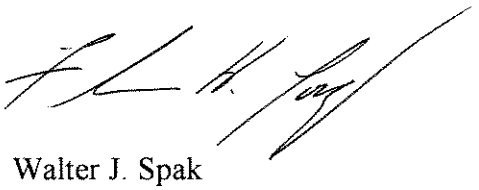
[36] *Id.* ¶ 7.140.

Respectfully submitted,



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